(1) FILED
991185 JAN 14 2000
OFFICE OF THE CLERK

NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

MARK SELING, Superintendent,
Special Commitment Center,

Petitioner,

v.

ANDRE BRIGHAM YOUNG,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

CHRISTINE O. GREGOIRE
Attorney General
State of Washington

SARAH BLACKMAN SAPPINGTON*
Assistant Attorney General

WILLIAM BERGGREN COLLINS
Senior Assistant Attorney General

DAVID J. W. HACKETT
Special Assistant Attorney General

900 Fourth Avenue, Suite 2000
Seattle WA 98164-1012
(206) 464-6430

**Counsel of Record*
Counsel for Petitioner

31 pp

QUESTION PRESENTED

In *Kansas v. Hendricks*, 521 U.S. 346 (1997), this Court held that the Kansas law authorizing commitment of sexually violent predators is civil in nature and does not violate the double jeopardy or *ex post facto* clauses. The Kansas law was modeled on Washington's Sexually Violent Predator Statute and the two laws are substantially similar. This case presents the following question regarding Washington's Sexually Violent Predator Statute:

Whether an otherwise valid civil statute can be divested of its civil nature and held to violate the double jeopardy and *ex post facto* clauses because the administrative agency operating the commitment facility fails to provide for treatment and other conditions of confinement mandated by statute at some time during the individual's commitment.

LIST OF PARTIES

The parties to the proceeding below were:

Petitioner: David Weston was the Respondent-Appellee below. Mr. Weston was the Superintendent of the Special Commitment Center when this matter was originally filed. Mark Seling is Mr. Weston's successor and the current Superintendent of the Special Commitment Center.

Respondent: Andre Brigham Young was the Petitioner-Appellant below.

TABLE OF CONTENTS

PETITION FOR A WRIT OF CERTIORARI 1

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 1

STATEMENT OF CASE 2

A. Legal Background 2

1. Washington's Sexually Violent Predator Statute 2

2. *Kansas v. Hendricks* 4

3. *Hudson v. United States* 5

B. Procedural History 6

1. Proceedings In State Court 6

2. Proceedings In The District Court 7

3. Proceedings In The Ninth Circuit 7

REASONS FOR GRANTING THE PETITION 9

A. The Ninth Circuit's Decision Conflicts With The Washington Supreme Court's Decision 10

B. The Conflict Between The Ninth Circuit And The Washington Supreme Court Has National Implications That Require Resolution By The Supreme Court 12

1. The Decisions Of This Court Do Not Support The Ninth Circuit's Exception To *Hudson* 13

2. The Ninth Circuit's "As Applied" Doctrine Is Unworkable 16

3. The Conflict Between The Ninth Circuit And The Washington Supreme Court Has National Implications 19

C. The Ninth Circuit's Decision Conflicts With *Hendricks* Because Washington's Statute Neither Involves The "Same Offense" Nor Is Retroactive 20

1. Washington's Law Does Not Violate The Double Jeopardy Clause Because It Does Not Address The "Same Offense" 21

2. Washington's Law Does Not Violate The *Ex Post Facto* Clause Because It Is Not Retroactive 22

CONCLUSION 23

TABLE OF AUTHORITIES

Cases

Allen v. Illinois,
478 U.S. 364 (1986) 8, 13, 15

Bell v. Wolfish,
441 U.S. 520 (1979) 8, 13, 15

Cole v. U.S. Dept. of Agriculture,
133 F.3d 803 (11th Cir. 1998) 13

Hudson v. United States,
522 U.S. 93 (1997) ..... passim

In re the Detention of Turay,
139 Wash. 2d 379, 986 P.2d 790 (1999) ..... passim

In re Young,
122 Wash. 2d 1, 857 P.2d 989 (1993) 1, 7, 15

Kansas v. Hendricks,
521 U.S. 346 (1997) ..... passim

Kennedy v. Mendoza-Martinez,
372 U.S. 144 (1963) 5

Memorial Hospital v. Maricopa County,
415 U.S. 250 (1974) 12

New Jersey v. Black,
153 N.J. 438, 710 A.2d 428 (1998) 13, 20

Powers v. Commonwealth,
426 Mass. 534, 694 N.E.2d 324 (1998) 13

State v. Seibert,
220 Wis. 2d 308, 582 N.W.2d 745, *review denied*,
220 Wis. 2d 366, 585 N.W.2d 158 (1998) 19

United States v. Halper,
490 U.S. 435 (1989) 6, 9

United States v. Lippert,
148 F.3d 974 (8th Cir. 1998) 13

Ward v. Illinois,
431 U.S. 767 (1977) 12

Young v. Weston,
192 F.3d 870 (9th Cir. 1999) 1

Youngberg v. Romeo,
457 U.S. 307 (1982) 18

Statutes

28 U.S.C. § 1254(1) 1

28 U.S.C. § 2254 7

42 U.S.C. § 1983 ..... 18, 19

Wash. Rev. Code § 71.09.020(1) 2

Wash. Rev. Code § 71.09.030 2

Wash. Rev. Code § 71.09.040(2) 2

Wash. Rev. Code § 71.09.050(1) 2

Wash. Rev. Code § 71.09.050(2) 3

Wash. Rev. Code § 71.09.050(3) 3

Wash. Rev. Code § 71.09.060(1) 3

Wash. Rev. Code § 71.09.070 3

Wash. Rev. Code § 71.09.080 (1990) 4, 17

Wash. Rev. Code § 71.09.080(1) 3

Wash. Rev. Code § 71.09.080(2) 3, 17

Wash. Rev. Code § 71.09.090 3

Wash. Rev. Code 71.09 1

Ariz. Rev. Stat. §§ 36-3701 – 36-3716 19

Cal. Welf. & Inst. Code § 6600 19

Fla. Stat. Ann. Ch. 916.31 – 916.49 19

725 Ill. Comp. Stat. Ann. 207 19

Iowa Code § 229A 19

Kan. Stat. Ann. § 59-29a01 *et seq.* 19

Minn. Stat. § 253B.185 & 253B.02, subds. 18b & 18c 19

Mo. Rev. Stat. § 632.480 19

N.J. Rev. Stat. § 30:4–27.26 19

N.D. Cent. Code § 25-03.3 19

S.C. Code Ann. § 44-48-10 19

Tex. Health & Safety Code Ann. § 841 19

Wis. Stat. Ch. 980 19

PETITION FOR A WRIT OF CERTIORARI

Mark Seling, Superintendent, Special Commitment Center (SCC), respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The Ninth Circuit's Order Amending Opinion and Denying Rehearing and Amended Opinion is reported at 192 F.3d 870 (9th Cir. 1999). App. at 1a-13a. The order of the district court is unpublished. App. at 15a-27a. The opinion of the Washington Supreme Court is reported at 122 Wash. 2d 1, 857 P.2d 989 (1993). App. 28a-102a.

JURISDICTION

The judgment of the Ninth Circuit was entered on May 20, 1999. On September 16, 1999, in response to a timely motion for rehearing en banc, the Court of Appeals issued an Order Amending Opinion and Denying Rehearing and Amended Opinion. On November 30, 1999, Justice O'Connor granted an extension of time in which to file a petition for a writ of certiorari to and including January 14, 2000. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Double Jeopardy Clause of the Fifth Amendment provides that "[n]o person . . . shall . . . be subject for the same offense to be twice put in jeopardy of life or limb . . . ." The *Ex Post Facto* Clause of Article 1, Section 10, provides that "[n]o State shall . . . pass any ex post facto Law . . . ."

The provisions of Washington's Sexually Violent Predator Statute (Statute), Wash. Rev. Code 71.09, as it existed when Respondent was committed, are set forth in the Appendix at pages 103a-110a. The Statute was amended in

1995 and the current version of the law is set forth in the Appendix at pages 112a-135a.

STATEMENT OF CASE

This case concerns a challenge to Washington's Sexually Violent Predator Statute which authorizes the civil commitment of sexually violent predators. The basis for the challenge is Respondent's claim that the law, as applied to him, is punitive and, therefore, violates the *ex post facto* and double jeopardy clauses of the Constitution.

A. Legal Background

1. Washington's Sexually Violent Predator Statute

A "sexually violent predator" is a person "who has been convicted of or charged with a crime of sexual violence and who suffers from a mental abnormality or personality disorder which makes the person likely to engage in predatory acts of sexual violence if not confined in a secure facility". Wash. Rev. Code § 71.09.020(1) (1998)[1], App. at 114a.

Under the Statute, the county prosecutor (or Attorney General acting on the prosecutor's behalf) may file a petition in superior court alleging that a person is a sexually violent predator. Wash. Rev. Code § 71.09.030, App. at 117a. Within 72 hours of the petition's filing, a hearing is held to determine whether there is probable cause to detain the person pending trial. Wash. Rev. Code § 71.09.040(2), App. at 118a. The Statute provides for a right to trial within 45 days of the probable cause determination. Wash. Rev. Code § 71.09.050(1), App. at 119a.

Throughout the trial proceedings, the detained person is entitled to counsel and to have qualified "experts or

[1]We cite to the current version of the Statute (App. at 112a-135a), except as otherwise indicated.

professional persons" perform an evaluation on his or her behalf. Wash. Rev. Code § 71.09.050(2), App. at 119a. The Statute allows for trial by jury, which must be unanimous in its finding. Wash. Rev. Code §§ 71.09.050(3), .060(1), App. at 120a-121a. At trial, the State must prove beyond a reasonable doubt that the person is a sexually violent predator. Wash. Rev. Code § 71.09.060(1), App. at 120a.

If the jury finds the person to be a sexually violent predator, he or she is then committed indefinitely to the custody of the Department of Social and Health Services (DSHS) "for care, control and treatment". Wash. Rev. Code § 71.09.060(1), App. at 120a.[2] Although the person has been involuntarily committed, the Statute provides:

> "Any person subjected to restricted liberty as a sexually violent predator pursuant to this chapter shall not forfeit any legal right or suffer any legal disability as a consequence of any actions taken or orders made, other than as specifically provided in this chapter." Wash. Rev. Code § 71.09.080(1), App. at 122a.

The Statute also requires that "*any person committed pursuant to this chapter has the right to adequate care and individualized treatment*". Wash. Rev. Code § 71.09.080(2), App. at 122a (emphasis added).[3]

[2] Each year, the Secretary of DSHS is required to undertake a current examination of the person's mental condition, danger to reoffend in a sexually violent manner, and amenability to treatment in a less restrictive setting than total confinement. This report is provided to the court and the person committed. Wash. Rev. Code § 71.09.070, App. at 122a. There is an annual judicial review of the commitment, and a person committed as a sexually violent predator may petition the court for an unconditional discharge or for conditional release to a less restrictive alternative. Wash. Rev. Code § 71.09.090, App. at 124a-125a.

[3] The requirement for adequate care and individual treatment in the current version of the Act carries over from the original law that required

2. *Kansas v. Hendricks*

In *Kansas v. Hendricks*, 521 U.S. 346 (1997), this Court considered a claim that the sexually violent predator law adopted by the state of Kansas violated the double jeopardy and *ex post facto* clauses of the Constitution. The Kansas law was modeled after Washington's Sexually Violent Predator Statute. *Hendricks*, 521 U.S. at 387 (Breyer, J., dissenting). The thrust of the claim was that the Kansas law "establishes a criminal proceeding; hence confinement under it necessarily constitutes punishment". *Id.* at 361.

The Court rejected this claim. The Court began its analysis by noting that the "characterization of a particular proceeding as civil or criminal is first of all a question of statutory construction". *Id.* (internal quotation marks omitted). In *Hendricks*, the Court concluded that "[n]othing on the face of the statute suggests that the legislature sought to create anything other than a civil commitment scheme designed to protect the public from harm." *Id.* The Court went on to explain "we will reject the legislature's manifest intent only where a party challenging the statute provides the clearest proof that the statutory scheme is so punitive either in purpose or effect as to negate the State's intention to deem it civil". *Id.* (internal quotation marks and punctuation omitted). After reviewing the Kansas law, the Court concluded that the law "does not establish a criminal proceeding and that involuntary confinement pursuant to the Act is not punitive". *Id.* at 369.

Even though it concluded that the Kansas law was civil, it went on to hold that the law did not violate the double jeopardy and *ex post facto* clauses. With regard to double jeopardy, the question was whether involuntary confinement under the Kansas law, after Mr. Hendricks had already served a criminal sentence, amounted to a "second punishment for the

---

that "the involuntary detention or commitment of persons under this chapter shall conform to constitutional requirements for care and treatment". Wash. Rev. Code § 71.09.080 (1990), App. at 109a.

same offense". *Id.* The Court concluded it did not because a proceeding under the Kansas law "does not define an 'offense,' the elements of which can be compared to the elements of an offense for which the person may previously have been convicted". *Id.* at 370. Any prior conviction is used "for evidentiary purposes to determine whether a person suffers from a 'mental abnormality' or 'personality disorder' and also poses a threat to the public". *Id.*

With regard to the *Ex Post Facto* Clause, the question was whether the Kansas law applied a new punitive measure to a crime already consummated. *Id.* The Court ruled there was no violation of the *Ex Post Facto* Clause because the Kansas law did "not have retroactive effect". *Id.* at 371. "To the extent that past behavior is taken into account it is used . . . solely for evidentiary purposes." *Id.*

3. *Hudson v. United States*

In *Hudson v. United States*, 522 U.S. 93 (1997), the Court again confronted the question of whether a proceeding was civil or criminal. In *Hudson*, the defendant claimed that the government's imposition of monetary sanctions following a criminal indictment violated the Double Jeopardy Clause, because the monetary sanction was based on the same conduct for which the defendant had previously been indicted. The issue before the Court was whether the subsequent administrative proceeding was civil or criminal. *Hudson*, 522 U.S. at 95.

The Court began with the reasoning it had applied in *Hendricks*. "Whether a particular punishment is criminal or civil is, at least initially, a matter of statutory construction." *Id.* at 99. If the legislature has expressed an intent to create a civil penalty, the Court inquires further "whether the statutory scheme was so punitive either in purpose or effect as to transform what was clearly intended as a civil remedy into a criminal penalty". *Id.* (citations omitted) (internal punctuation omitted). The factors listed in *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168-169 (1963), provide useful

guideposts. *Hudson*, 522 U.S. at 100. However, "*these factors must be considered in relation to the statute on its face*". *Id.* (emphasis added). Further, "only the clearest proof will suffice to override legislative intent and transform what has been denominated a civil remedy into a criminal penalty". *Id.* (citation omitted) (internal punctuation omitted).

In *Hudson*, the Court "disavow[ed] the method of analysis used in *United States v. Halper*, 490 U.S. 435 (1989)". *Hudson*, 522 U.S. at 95. *Halper* deviated from traditional double jeopardy doctrine because the Court focused "on the character of the actual sanction imposed, rather than, as *Kennedy* demanded, *evaluating the statue on its face* to determine whether it provided for what amounted to a criminal sanction". *Id.* at 101 (emphasis added) (citations omitted) (internal punctuation omitted).

In reviewing the monetary penalty, the Court concluded that the legislature intended to create a civil remedy and that applying the *Kennedy* factors to the statute, on its face, did not overcome that legislative declaration. *Id.* at 104-05.

B. Procedural History

1. Proceedings In State Court

One day prior to his release from prison for his most recent rape conviction, the State filed a petition under the Statute to determine whether Andre Brigham Young was a sexually violent predator. The certification for determination of probable cause referenced two psychological evaluations of Young and his criminal history which included convictions for six violent felony rapes over a thirty-one-year period. After reviewing the petition and supporting certification, the court found probable cause and later scheduled a trial. On March 8, 1991, Young was determined by a unanimous jury to be a sexually violent predator and was committed to DSHS for "care, control and treatment". Young was sent to the Special Commitment Center operated by DSHS.

Young appealed his commitment directly to the Washington Supreme Court, challenging the constitutionality of the Statute on a variety of grounds, including *ex post facto* and double jeopardy. In August 1993, the court upheld the constitutionality of Washington State's Sexually Violent Predator Statute in *In re Young*, 122 Wash. 2d 1, 857 P.2d 989 (1993). *See* App. at 28a. The court rejected Young's *ex post facto* and double jeopardy challenges because "[b]oth the language of the Statute and the legislative history evidence a clear intent to create a civil scheme." App. at 38a. The court then applied the *Kennedy* factors and concluded that these "factors weigh heavily on the side of finding that this statute is civil". App. at 42a. According to the court, "[t]he Statute before us is primarily concerned with incapacitation and treatment." App. at 42a.

2. Proceedings In The District Court

Following the decision of the Washington Supreme Court, Young filed a petition for writ of habeas corpus in federal district court under 28 U.S.C. § 2254. On August 25, 1995, the federal district court for the Western District of Washington held the Statute unconstitutional on *ex post facto*, double jeopardy, and substantive due process grounds, but stayed Young's release. The State appealed to the Ninth Circuit. After issuance of this Court's decision in *Kansas v. Hendricks*, the Ninth Circuit entered an order remanding this case to the district court for reconsideration in light of *Hendricks*.

On February 10, 1998, the district court dismissed Young's petition, upholding the Statute's constitutionality under *Hendricks* and rejecting all of Young's claims. App. at 15a-27a.

3. Proceedings In The Ninth Circuit

Young appealed to the Ninth Circuit which reversed the district court. Initially the Ninth Circuit determined that, because the Kansas Act "was modeled on and is substantially

similar to the Washington statute, *Hendricks* forecloses the claim that the Washington statute, on its face, violates the *ex post facto* and double jeopardy clauses". App. at 6a-7a.

Nonetheless, the court reasoned that "*Hendricks* did not preclude the possibility that the Washington statute, *as applied*, is punitive. . . . And, following the dictates of *Hendricks*, we look to the *conditions* of Young's confinement when we make that determination". App. at 7a.

The court rejected the State's argument that *Hudson* precluded consideration of actual conditions of confinement when undertaking a double jeopardy and *ex post facto* analysis because the "purpose and effect" inquiry under the Double Jeopardy Clause must be conducted "*in relation to the statute on its face*", and not with regard to the sanction imposed in any particular case. *Hudson*, 522 U.S. at 99-100, 116 (emphasis added). In a footnote, the Ninth Circuit purported to distinguish *Hudson* as involving "monetary penalties and occupational disbarment", whereas "this case involves confinement". App. at 7a n.4. Citing to *Hendricks*, *Allen v. Illinois*, 478 U.S. 364, 373-74 (1986), and *Bell v. Wolfish*, 441 U.S. 520, 535-39 (1979), the Ninth Circuit asserted that "the Supreme Court has always looked to the actual conditions of confinement in cases considering the question of whether confinement is criminal or civil". App. at 7a n.4.

The Ninth Circuit determined that Young had alleged facts which, if proved, would establish the punitive nature of his confinement and would entitle him to relief.[4] Because the Ninth Circuit determined that the Washington state courts had not afforded Young a full and fair hearing on that issue, the court remanded the case for an evidentiary hearing on the *ex post facto* and double jeopardy clause claims.

[4] Although the court did not specify precisely the nature of the relief to which Young might be entitled, Young has consistently maintained that he is entitled to release.

The Ninth Circuit did not address this Court's conclusion in *Hendricks* that the Kansas law (and the Washington law upon which it was modeled) did not violate the Double Jeopardy Clause because commitment as a sexually violent predator did not involve the same offense for which a predator may have been punished. Nor did the Ninth Circuit address the holding in *Hendricks* that there was no violation of the *Ex Post Facto* Clause because the law was not retroactive, in that prior behavior was taken into account for evidentiary purposes only.

The State filed a timely petition for rehearing en banc which was denied.

REASONS FOR GRANTING THE PETITION

There are three important reasons to grant the petition. First, the Ninth Circuit's decision directly conflicts with the decision of the Washington Supreme Court in *In re the Detention of Turay*, 139 Wash. 2d 379, 986 P.2d 790 (1999), which specifically rejects the Ninth Circuit's "as applied" analysis. This clear conflict between the Ninth Circuit and the Washington Supreme Court creates the intolerable situation in which the same litigant bringing the same claim will receive one answer in federal court and an entirely different answer in state court. This confusion can only be resolved by a decision of the United States Supreme Court.

Second, the conflict between the Ninth Circuit and the Washington Supreme Court has broader implications. In *Hendricks*, this Court upheld the constitutionality of commitment laws for sexually violent predators, such as that adopted by Kansas. In *Hudson*, this Court disavowed *Halper* and held that a court must analyze a statute on its face in determining whether it is civil or criminal. The Ninth Circuit departs from these holdings to look at actual conditions of confinement. For Young and all other civilly committed individuals across the country, the "as applied" double jeopardy and *ex post facto* doctrine announced by the Ninth

Circuit reopens issues settled by this Court in *Hendricks* and *Hudson*.

Third, the Ninth Circuit's decision directly conflicts with the holding in *Hendricks* that the double jeopardy and *ex post facto* clauses are not violated because sex predator laws, like those in Kansas and Washington, do not operate retroactively and do not involve the same offense for which a predator may have previously been convicted.

A. The Ninth Circuit's Decision Conflicts With The Washington Supreme Court's Decision

Roughly one month after the Ninth Circuit's decision in this case, the Washington Supreme Court decided *In re Turay*. Turay was found by a jury to be a sexually violent predator and appealed his commitment order challenging the constitutionality of the Statute. Turay claimed that "conditions at the [Special Commitment Center] are punitive and thereby render RCW 71.09 a criminal statute 'as applied' to him, and thus violative of the double jeopardy clause". *In re Turay*, 986 P.2d at 809. Turay's allegations of punitive conditions and inadequate treatment were identical to the allegations considered by the Ninth Circuit.[5]

Acknowledging that Turay's argument had been recently accepted by the Ninth Circuit in this case, the Washington Supreme Court expressly refused to follow the Ninth Circuit's decision:

> "We are not unmindful of the fact that the Ninth Circuit Court of Appeals has recently held that *Hendricks* 'does not preclude the possibility that the Washington [SVP] statute, as applied, is punitive.' . . . *This court is, of course, not bound by that decision and, for the aforementioned reasons, we decline to follow it.*" *Id.* at 812 (emphasis added).

[5] Indeed, both Turay's and Young's allegations arose out of claims made in connection with Turay's 42 U.S.C. § 1983 lawsuit which is currently pending in federal district court for the Western District of Washington. *Turay v. Seling*, No. C91-664WD. Pursuant to an injunction entered June 6, 1994, the district court has been closely monitoring conditions at the SCC through periodic hearings and orders.

The Washington Supreme Court concluded that Turay's "as applied" double jeopardy challenge to the Statute, based upon the conditions at the Special Commitment Center rather than the language of the Statute, was "flawed". *Id.* at 810. According to the Washington Supreme Court, *Hudson*

> "clearly stands for the proposition that, in performing double jeopardy analysis, *a court must look at the statute on its face* to determine whether it actually provides for a criminal sanction, rather than evaluating the character of the actual sanctions as imposed." *Id.* at 811 (emphasis added).

The Washington Supreme Court also rejected the Ninth Circuit's attempt to distinguish *Hudson* on the basis that *Hudson* involved monetary penalties and occupational disbarment instead of confinement, stating:

> "*We believe that the Supreme Court meant what it said when it mandated in Hudson that, when performing a double jeopardy analysis, statutes must be evaluated on their face rather than assessing the character of the actual sanctions imposed* . . . . In *Hudson*, the Supreme Court expressly stated that while there are several factors which serve as useful guideposts in performing a double jeopardy analysis, none of these factors, including whether the sanction involves an affirmative disability or restraint, should be elevated to

'dispositive status' or 'considered controlling.' *Hudson*, 522 U.S. at 101." *Id.* at 812 n.30 (emphasis added).

The conflict between the Ninth Circuit and the Washington Supreme Court is clear. The Washington court rejected the reasoning in the Ninth Circuit's opinion and refused to follow it. This conflict is significant and requires immediate resolution. When there is a conflict between different circuits or different states, the law within each circuit or state is settled; the only issue then is one of national uniformity. In Washington, however, two courts have issued two completely irreconcilable decisions. By its very nature, civil commitment must proceed in a stable environment. The split between the Ninth Circuit and the Washington Supreme Court imposes a state of confusion which can only be settled by a decision of this Court.[6]

B. The Conflict Between The Ninth Circuit And The Washington Supreme Court Has National Implications That Requires Resolution By The Supreme Court

The conflict between the Ninth Circuit and the Washington Supreme Court turns on a fundamental issue that has significant national implications. The Washington

[6] In the past, this Court has granted review to resolve a conflict between a federal court and a state supreme court over the constitutionality of the state's law. *See Ward v. Illinois*, 431 U.S. 767, 770-771 (1977) ("The Illinois Supreme Court expressly rejected [the] challenge to the constitutionality of the Illinois obscenity statute . . . and we noted probable jurisdiction to resolve a conflict with a decision of a three-judge District Court for the Northern District of Illinois."); *Memorial Hosp. v. Maricopa Cy.*, 415 U.S. 250, 252-253 (1974) ("In a prior three-judge federal court suit against Pinal County, Arizona, the District Court had also declared the residence requirement unconstitutional. . . . Nonetheless, the Arizona Supreme Court upheld the requirement. To resolve the conflict between a federal court and the highest court of the State, we noted probable jurisdiction.").

Supreme Court concluded that this Court "meant what it said when it mandated in *Hudson* that, when performing a double jeopardy analysis, statutes must be evaluated on their face rather than assessing the character of the actual sanctions imposed". *In re Turay*, 986 P.2d at 812 n.30. This is also the approach taken by other courts after *Hudson* both where no confinement is involved (*see, e.g., United States v. Lippert*, 148 F.3d 974, 976 (8th Cir. 1998); *Cole v. U.S. Dept. of Agriculture*, 133 F.3d 803, 806 (11th Cir. 1998); *Powers v. Commonwealth*, 426 Mass. 534, 694 N.E.2d 324, 328 n.9 (1998)), and where the result will be confinement (*see, e.g., New Jersey v. Black*, 153 N.J. 438, 710 A.2d 428, 432 (1998)).

According to the Ninth Circuit, the requirement that a statute be analyzed on its face to determine whether it is civil or criminal does not apply in cases that involve confinement. In such cases, according to the Ninth Circuit, the Court "has always looked to the actual conditions of confinement". App. 7a n.4. The Ninth Circuit's conclusion on this point creates a significant exception to the rule set out in *Hudson*. Allowing an *ex post facto* and double jeopardy challenge to proceed against a sexually violent predator law based solely upon conditions of confinement disrupts this Court's carefully crafted jurisprudence in this area.

The Ninth Circuit's "as applied" exception to *Hudson* is not supported by the Court's decisions and is unworkable in practice. Since the issue of civil commitment of sexually violent predators is national in scope, the Court should grant review to resolve the question.

1. The Decisions Of This Court Do Not Support The Ninth Circuit's Exception To *Hudson*

The Ninth Circuit cites *Hendricks*, *Allen*, and *Bell* to support its "as applied" exception to *Hudson*. App. at 7a n.4. These decisions do not support the Ninth Circuit's analysis.

Contrary to the Ninth Circuit's conclusion, the *Hendricks* majority based its decision on the Kansas statute, not on the actual conditions of Mr. Hendricks' confinement. *Hendricks* addressed facts nearly identical to those assumed by the Ninth Circuit when evaluating Young's allegations. Even when assuming the possibility that Kansas was unconstitutionally withholding available treatment, the *Hendricks* Court based its *ex post facto* and double jeopardy holding on the language of the statute adopted by the legislature:

> "Indeed, *critical language in the Act itself demonstrates that the Secretary* of Social and Rehabilitation Services, under whose custody sexually violent predators are committed, *has an obligation to provide treatment* to individuals like Hendricks. . . . Other of *the Act's* sections echo this obligation to provide treatment for committed persons. . . . Thus, as in *Allen* [*v. Illinois*], 'the State has a statutory obligation to provide care and treatment for [persons adjudged sexually dangerous] designed to effect recovery,' . . . and we may therefore conclude that 'the State has . . . provided for the treatment of those it commits.'" *Hendricks*, 521 U.S. at 367 (emphasis added).

In summarizing its *ex post facto* and double jeopardy civil-versus-criminal analysis, the Supreme Court listed the factors that resulted in its decision:

> "Where the State has 'disavowed any punitive intent'; limited confinement to a small segment of particularly dangerous individuals; provided strict procedural safeguards; directed that confined persons be segregated from the general prison population and afforded the same status as others who have been civilly committed; recommended treatment if such is possible; and permitted immediate release upon a showing that the individual is no longer dangerous or mentally impaired, we cannot say that it acted with punitive intent." *Id.* at 368-69.

Thus, consistent with its later-issued opinion in *Hudson*, the *Hendricks* Court limited its *ex post facto* and double jeopardy holdings to an examination of the language of the Kansas Act, rather than the conditions actually experienced by Mr. Hendricks.

The *Allen* decision relied upon by the Ninth Circuit concerned an Illinois law authorizing the civil commitment of sexually dangerous persons. The question before the Court was whether, for Fifth Amendment purposes, Illinois' statute was civil or criminal. As in *Hendricks*, the *Allen* Court's focus was on the statutory language rather than the actual daily conditions of confinement experienced by Allen. Although noting that "it might well be a different case" if petitioners had shown conditions of confinement essentially identical to that of felons, the Court did not remand for additional evidence on the statute "as applied". Instead, the Court looked again to the language of the statute, noting that, "counsel for the State assures us that, *under Illinois law,* sexually dangerous persons must not be treated like ordinary prisoners". *Allen*, 478 U.S. at 374 (emphasis added).[7]

Finally, the Ninth Circuit's citation to *Bell* is inapposite. In *Bell*, pretrial detainees brought a class action suit alleging that deficient conditions of confinement violated their rights to due process. The suit did not raise *ex post facto* or double jeopardy claims. While the Court focused on conditions of confinement, it did so in order to determine whether an injunction should issue in order to change those conditions, not to determine whether the underlying law authorizing pretrial detention was civil or criminal. *Bell*, 441 U.S. at 523-30.

---

[7] Similarly, the Washington Supreme Court determined that, *under Washington law*, "the regulations governing the commitment facility specifically provide a wider range of privileges than those associated with a prison setting". *In re Young*, 857 P.2d at 1005.

The Ninth Circuit has essentially created its "as applied" analysis out of whole cloth and misses the point of the "on its face" limitation adopted by *Hudson*. The exclusive focus of a civil-versus-criminal analysis under the *ex post facto* and double jeopardy clauses is the action of the legislative branch in adopting a statute. Intent to create a criminal statute can be inferred from the language of that statute, or it can arise from the "purpose and effect" of the statute, i.e., those practices or actions which naturally and necessarily flow from the language of the statute as enacted by the legislature.

Contrary to the Ninth Circuit's analysis, it does not matter to the double jeopardy analysis whether the civil action involves confinement or some other penalty. With *Halper* overruled, the Double Jeopardy Clause cannot operate as a sliding scale protection depending on the severity of the unlawful punishment. A focus on the actual civil sanction rather than the statutory scheme "flies in the face of the notion that the Double Jeopardy Clause forbids the government from even attempting a second time to punish criminally". *Hudson*, 522 U.S. at 101 (internal citations omitted). After *Hudson*, there is no support for the Ninth Circuit's position that allows double jeopardy and *ex post facto* prohibitions to vary depending upon the nature of the sanction applied in a particular case.

2. The Ninth Circuit's "As Applied" Doctrine Is Unworkable

In this case, the Washington Legislature adopted an involuntary commitment scheme that was civil both in its intent and in its purpose and effect. Even the Ninth Circuit agrees that "*Hendricks* forecloses the claim that the Washington Statute, on its face, violates the *ex post facto* and double jeopardy clauses". App. at 7a. Yet, under the Ninth Circuit's "as applied" doctrine, the law will lose its "civil" status if the actual operation of the Special Commitment

Center is punitive. This "as applied" test is unworkable in two respects.

First, the Ninth Circuit's notion that administrative action can "divest" a statute of its civil nature is particularly troubling. The Washington Statute requires constitutionally adequate treatment for sexual predators. Wash. Rev. Code §§ 71.09.080 (1990), .080(2) (1998), App. at 109a, 122a. Now, many years after passage of the Statute, the Ninth Circuit's "as applied" double jeopardy and *ex post facto* doctrine may operate to "divest" the Statute of its civil intent and purpose through reliance on the actions of an executive branch administrative agency. No other constitutional doctrine operates in this manner -- granting an executive branch agency the power to effectively invalidate a statute through improper administration, which is in violation of the statute's express mandate. The Court should closely question the wisdom of this expansion of executive branch power under the guise of the double jeopardy and *ex post facto* clauses.

Second, it is not clear how the "as applied" test would work in practice since the conditions of confinement may change over time. For example, what happens if treatment at the Special Commitment Center is now proper but was not adequate during Young's first years of his confinement? Double jeopardy protections cannot "attach" and "un-attach" with changes in conditions of confinement. Under the "as applied" approach, the constitutionality of the law may change from year to year, while the original legislative purpose to create a civil commitment law remains the same.

Hudson warns that double jeopardy (and by implication, *ex post facto*) jurisprudence should not be the vehicle for addressing all types of ill:

> "Finally, it should be noted that some of the ills at which *Halper* was directed are addressed by other constitutional provisions. The due process and equal protection clauses

> already protect individuals from sanctions which are downright irrational. . . . The additional protection afforded by extending double jeopardy protections to proceedings heretofore thought to be civil is more than offset by the confusion created by attempting to distinguish between 'punitive' and 'nonpunitive' penalties." *Hudson*, 522 U.S. at 102-03.

A more practical approach to address conditions of confinement was noted by the Washington Supreme Court in *In re Turay*. According to the Washington court, the appropriate remedy for improper conditions of confinement at the Special Commitment Center lies in an action to change the conditions pursuant to 42 U.S.C. § 1983:

> "Turay's remedy for unconstitutional conditions of confinement at the SCC is, therefore, an injunction action and/or an award of damages . . . . Further, the federal court is maintaining a zealous watch over the conditions at SCC to enforce the injunction that it put in place. Accordingly, Turay has an adequate remedy that will guarantee that the conditions at the SCC will meet or exceed constitutional standards." *In re Turay*, 986 P.2d at 812[8]; *see also Youngberg v. Romeo*, 457 U.S. 307 (1982).

---

[8]The Wisconsin Court of Appeals reached a similar conclusion when considering the question of whether deficient conditions at Wisconsin's sexually violent persons treatment facility merited the predator's release:

> "[T]he State argues persuasively that even if Seibert were correct that the center failed to develop a treatment program for his special needs, his conclusion that he should be released would place society at risk for his acts of sexual violence and produces an absurd result. Rather, they argue, his remedy is to litigate that issue and, if successful, obtain appropriate treatment not supervised release. We agree." *State v. Seibert*, 220 Wis. 2d 308, 582 N.W.2d 745, 749, *review denied*, 220 Wis. 2d 366, 585 N.W.2d 158 (1998).

It is not in dispute that Young is statutorily entitled to adequate care and treatment. However, 42 U.S.C. § 1983 provides a remedy to correct any deficiencies. As noted above, such an action is already proceeding in federal district court for the benefit of Mr. Young and others confined there. There is no need to adopt an expanded *ex post facto* and double jeopardy doctrine allowing for a parallel action in habeas corpus.

3. The Conflict Between The Ninth Circuit And The Washington Supreme Court Has National Implications

The conflict between the Ninth Circuit and the Washington Supreme Court over the interpretation of *Hudson* has national implications. Thirteen other states have laws authorizing civil commitment of violent sexual predators.[9] After *Hendricks* and *Hudson*, these laws were civil in nature if the statutes were similar to the Kansas statute upheld in *Hendricks*. The Ninth Circuit's decision casts doubt on the validity of these statutes. Under the "as applied" test, the civil or criminal nature of a law turns on the conditions of confinement at some unspecified time, which may fluctuate over time.

---

[9]These states are: Arizona (Ariz. Rev. Stat. §§ 36-3701 – 36-3716), California (Cal. Welf. & Inst. Code § 6600), Florida (Fla. Stat. Ann. Ch. 916.31 – 916.49), Illinois (725 Ill. Comp. Stat. Ann. 207), Iowa (Iowa Code § 229A), Kansas (Kan. Stat. Ann. § 59-29a01 *et seq.*), Minnesota (Minn. Stat. § 253B.185 & 253B.02, subds. 18b & 18c), Missouri (Mo. Rev. Stat. § 632.480), New Jersey (N.J. Rev. Stat. § 30:4-27.26), North Dakota (N.D. Cent. Code § 25-03.3), South Carolina (S.C. Code Ann. § 44-48-10), Texas (Tex. Health & Safety Code Ann. § 841), and Wisconsin (Wis. Stat. Ch. 980).

Further, all 50 states have traditional civil commitment laws. Like sex predator commitments, the mental disorder and dangerousness required for commitment can often be evidenced by prior criminal actions. Such commitment laws are now, under the Ninth Circuit's reasoning, vulnerable to double jeopardy and *ex post facto* challenges based on claims of unconstitutional conditions of confinement. Likewise, "punitive" conditions of confinement could, under the Ninth Circuit's theory, transform regulatory proceedings like parole revocations into a criminal proceeding in violation of the Double Jeopardy Clause. *See generally New Jersey v. Black*, 710 A.2d 428.

The Ninth Circuit's decision will doubtless spawn substantial litigation addressing conditions of confinement under the "as applied" theory.[10] There are, as the law now stands, two lines of conflicting authority to guide courts in interpreting *Hendricks* and *Hudson* on this issue—the Ninth Circuit decision in *Young* and the Washington Supreme Court decision in *In re Turay*. The Court should grant review to resolve this conflict and clarify the law for judging the validity of these laws.

C. The Ninth Circuit's Decision Conflicts With *Hendricks* Because Washington's Statute Neither Involves The "Same Offense" Nor Is Retroactive

In addition to concluding that the Kansas law was civil, *Hendricks* held that Kansas' Sexually Violent Predator Act does not violate the double jeopardy and *ex post facto* clauses due to the absence of the "same offense" and retroactivity requirements. In order to prevent the *ex post facto* and double jeopardy clauses from operating as catch-all

[10] At present, conditions of confinement litigation is pending in several states, including Wisconsin (*see, e.g., West v. Macht*, U.S. Court of Appeals for the Seventh Circuit, Cause No. 99-1169), Illinois (*see, e.g., In re Traynoff*, Kane County, Illinois, Cause No. 98 HR 456), and California (*see, e.g., Hydrick v. Wilson*, C.D. Cal., Cause No. CV 98-7167TJH (RNB).

categories for constitutional relief, this Court has defined the minimum attributes for these claims. By allowing an *ex post facto* and double jeopardy challenge to proceed against a sexually violent predator law based solely upon conditions of confinement, but absent the additional doctrinal requirements identified in *Hendricks*, the Ninth Circuit disrupts this Court's carefully crafted jurisprudence in this area.

1. Washington's Law Does Not Violate The Double Jeopardy Clause Because It Does Not Address The "Same Offense"

The Ninth Circuit assumes that, if Young's confinement is punitive, then the Statute "punishes Young again . . . for the same offense". App. at 6a. This conclusion directly conflicts with *Hendricks*, which held that Kansas' Sexually Violent Predator Act does not implicate the "same offense" prong of the Double Jeopardy Clause:

> "*A proceeding under the Act does not define an 'offense,' the elements of which can be compared to the elements of an offense for which the person may previously have been convicted.* Nor does the Act make commission of a specified 'offense' the basis for invoking the commitment proceedings. *Instead, it uses a prior conviction* (or previously charged conduct) *for evidentiary purposes* to determine whether a person suffers from a 'mental abnormality' or 'personality disorder' and also poses a threat to the public. Accordingly, *we . . . conclude that the Act does not violate the Double Jeopardy Clause.*" *Hendricks*, 521 U.S. at 370 (emphasis added).

The Ninth Circuit decision did not analyze or even mention this holding in *Hendricks*. It is, however, controlling. As with Kansas' Act, commission of a specific offense is relevant for evidentiary purposes, but does not

form the basis of the commitment. The Ninth Circuit's determination to allow Mr. Young's double jeopardy challenge to proceed cannot be reconciled with this holding from *Hendricks* that Kansas' Act, modeled on and in all pertinent respects indistinguishable from Washington's Statute, does not implicate the "same offense".

2. Washington's Law Does Not Violate The *Ex Post Facto* Clause Because It Is Not Retroactive

The Ninth Circuit decision further conflicts with *Hendricks* in its "as applied" *ex post facto* holding. The *Ex Post Facto* Clause comes into play only when the new punishment is retroactive in operation. *Hendricks*, 521 U.S. at 370-71.

Again without analysis, the Ninth Circuit asserts that the Statute "imposes a new punitive measure . . . for crimes [Young] committed before the statute's enactment". App. at 6a. However, *Hendricks* held that Kansas' Act was not retroactive:

> "*Moreover, the Act clearly does not have retroactive effect.* Rather, the Act permits involuntary commitment based upon a determination that the person *currently* both suffers from a 'mental abnormality' or 'personality disorder' and is likely to pose a future danger to the public. *To the extent that past behavior is taken into account, it is used, as noted above, solely for evidentiary purposes.* Because the Act does not criminalize conduct legal before its enactment, nor deprive Hendricks of any defense that was available to him at the time of his crimes, the *Act does not violate the Ex Post Facto Clause.*" *Id.* at 371 (emphasis added).

Once again the Ninth Circuit's decision ignores this holding in *Hendricks*. The holding applies equally to this case since, as is the case with Kansas' law, past behavior is taken into account only for evidentiary purposes.

The Ninth Circuit's decision on these issues is in direct conflict with *Hendricks*. This is not a situation where the Ninth Circuit attempts to distinguish a decision of the Supreme Court, as it did in this case in its discussion of *Hudson*. Instead, the Ninth Circuit simply ignored the holding of this Court in *Hendricks*. By abandoning the requirements of "same offense" and retroactivity, the Ninth Circuit expands these doctrines well beyond the confines recognized by this Court. The Court should grant review to resolve this conflict.

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectfully Submitted,

CHRISTINE O. GREGOIRE
Attorney General
State of Washington

SARAH BLACKMAN SAPPINGTON*
Assistant Attorney General

WILLIAM BERGGREN COLLINS
Senior Assistant Attorney General

DAVID J. W. HACKETT
Special Assistant Attorney General

900 Fourth Avenue, Suite 2000
Seattle WA 98164-1012
(206) 464-6430

**Counsel of Record*
Counsel for Petitioner

January 2000